

Nirmalendu Biswas Vs. the State

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Court : Guwahati

Decided On : Jun-20-1987

Judge : S.N. Phukan, J.

Appellant : Nirmalendu Biswas

Respondent : The State

Prior history : S.N. Phukan, J. 1. This is an appeal against the judgment and order dated 2-11-79 passed by the learned Special Judge, Assam, at Gauhati in Special Case No. 10 of 1975. By the aforesaid judgment, the learned trial Court found the accused person guilty under Section 5(2) read with Section 5(l)(d) of the Prevention of Corruption Act, 1947 and under Section 420,1.P.C. and convicted him accordingly. The learned Special Judge sentenced the accused person to undergo rigorous imprisonment for term of

Judgement :

S.N. Phukan, J.

1. This is an appeal against the judgment and order dated 2-11-79 passed by the learned Special Judge, Assam, at Gauhati in Special Case No. 10 of 1975. By the aforesaid judgment, the learned trial Court found the accused person guilty under Section 5(2) read with Section 5(l)(d) of the Prevention of Corruption Act, 1947 and under Section 420,1.P.C. and convicted him accordingly. The learned Special Judge sentenced the accused person to undergo rigorous imprisonment for term

of one year and fine of Rs. 800/- for the offence under the Prevention of Corruption Act and also sentenced him to undergo rigorous imprisonment for a term of one year and fine of Rs. 200/- for the offence under Section 420, I.P.C. The sentences are to run concurrently.

2. On 9-4-73, the Superintendent of Police, Delhi Special Police Establishment, Shillong filed the First Information Report and from the said F.I.R. I find that according to the prosecution Late B. N. Borbora while functioning as Extra Assistant Commissioner and Ex-officio Assistant Director (Establishment) in the office of the Director of Supply and Transport, Arunachal Pradesh at Jorhat entered into a criminal conspiracy with the accused Sri. N. Biswas, the then Office Superintendent (Establishment) in the same office and in pursuance of such a conspiracy made a fake appointment order in the name of one fictitious person Sri. N. Ahmed for the post of peon in the office of the Assistant Director, Supply and Transport, Arunachal Pradesh at North Lakhimpur without the approval of the Director for the period from 1-7-71 to 30-11-71. The said alleged fake appointment order No. Estt-R/67(PER)/25 was issued on 4-2-72. It is further alleged that pay and allowances of the said peon Sri N. Ahmed for the above period amounting to Rs. 775/- was drawn on 9-2-72 at Jorhat and was sent to North Lakhimpur with an Acquittance Roll through accused N. Biswas for payment. It is further alleged that the signature of the payee on the Acquittance Roll was not attested by any officer nor a disbursement certificate by the officer-in-charge of North Lakhimpur Branch Office was obtained along with the Acquittance Roll. This amount was entered in the cash book maintained at Jorhat office on 16-2-72 and was attested by late B. N. Borbora. According to prosecution, no such person known as Sri N. Ahmed ever worked for the above period and as such the amount was drawn falsely and was shown falsely as disbursed and thereby the administration of Arunachal Pradesh was cheated. However, after investigation the charge-sheet was submitted against accused N. Biswas and one Praduyat Barkataki, Cashier in the office of the Director of Supply and Transport at Jorhat and in the charge-sheet, it was alleged that accused N. Biswas and Sri Barkataki, Cashier conspired together and as a result of such conspiracy Cashier Barkataki handed over the said amount of Rs. 775/- to the accused Sri N. Biswas although no such person by name Shri N. Ahmed was appointed or was working for the aforesaid period. No charge-

sheet however, was submitted against late B. N.-Berbora, but he was cited as a witness for the prosecutor. From the F.I.R. and charge-sheet, it transpires that one Sri B. P. Sharma was working in the office of the Assistant Director of Supply and Transport at North Lakhimpur and he went on leave with effect from 2-1-71 and one Sri K. Tayo was recommended for appointment in the vacancy caused due to leave of Sri B. P. Sarma. Since this was not accepted one Sri S. Tapno was recommended for appointment who was appointed as peon with effect from 1-12-71. It is alleged that in processing the appointment of Sri Tapno accused N. Biswas made a false statement that Sri N.Ahmed worked as peon from 1-7-71 to 30-11-71 in the vacant post of Sri B. P. Sarma. According to the prosecution on the basis of the above note of the accused, appointment order of Sri N. Ahmad was issued on 4-2-1972.

3. The learned Special Judge discharged Sri P. Barkataki but framed charge against the accused-appellant under Section 5(l)(d) punishable under Section 5(2) of the Prevention of Corruption Act for short, 'the Act' and under Section 420, I.P.C. The accused pleaded not guilty.

4. Prosecution examined 15 witnesses and proved 198 documents and the learned Special Judge recorded the statement of the accused under Section 313, Cr.P.C. and after considering the evidence on record convicted the accused-appellant accordingly. It may be stated that late B. N. Borbora though cited as a prosecution witness could not be examined due to his death during trial.

5. The learned trial Court held that it had jurisdiction to try the case, sanction for prosecution was legally and validly made and that the accused manipulated the appointment of a peon Sri N. Ahmed. Though the learned trial Court came to the finding that the prosecution failed to prove conclusively and beyond reasonable doubt that the said sum of Rs. 775/- being the pay and allowances of Sri N. Ahmed was paid to the accused, the learned trial Court, however, was of the opinion that as the amount was drawn on the authority of the false order of appointment manipulated by the accused and paid on the basis of the said false order, the Administration suffered financial loss and as such the accused could not escape from his liability under Section 5(l)(d) of the Act and he also committed the

offence under Section 420, I.P.C.

6. P.W. 1 is the Office Superintendent of the office of the Director of Supply and Transport, Jorhat. He has given file procedure of appointment and stated that all appointments were made on the basis of application. He has proved the personal file of Sri B. P. Sarma, Exhibit 10 and according to him the said file contains all corresponding papers concerning appointment of person in the vacancy caused due to leave etc. of Sri B. P. Sarma. He has proved Exhibit 11, the appointment letter dated 4-2-72 of Sri N. Ahnifd and signature of late Borbora and initial of accused-appellant in the said Ext. 11. He has proved the note put up by accused regarding working of Sri N. Ahmed for the period in question which has been marked as Ext. 7 and also the endorsement of late Borbora to the Director and the said endorsement has been marked as Ext. 8. According to him Ext. 12 is a slip issued by the accused-appellant stating that he had paid the amount to Shri N. Ahmed and Anr. sum to one Sri A. K. Roy from his own pocket and requested the cashier to pay the amount to him. He has proved Ext 13, the acquittance roll of Sr. A. K Roy and Sri N. Ahmed. According to him, personal file of Sri B. P. Sarma, Ext. 10 does not contain any application or joining report of any person by name Sri N. Ahmed. He has also proved Ext 9 which is an order passed by the Director on the endorsement of late Borbora, the Assistant Director, Ext. 8. By Ext 9, the Director asked the Assistant Director 'to speak'. In cross-examination he has specifically stated that, every employee of the establishment of the Directorate has a personal file, that Ext. 11, the appointment order of Sri N. Ahmed was signed by late Borbora, Assistant Director and approved by Sri Haranga, Director. He has admitted that he had no knowledge regarding the number of attendance register maintained in his office. He has also admitted that sometimes they are required to work under verbal orders of the Director. From his evidence, I find that some personal peons were attached to the Director and the said peons used to stay in the residence of the Director. He does not know whether the personal peons put their signature in the attendance register. The evidence of P.W. 2 is not very material as he only prepared the bill of Sri N. Ahmed for the aforesaid period. P.W. 3 has stated that the payment of money through acquittance roll is required to be attested by the officer. He has proved Ext. 119, the cash book of the office of the Director and Ext, 119(1) is the entry regarding pay of Sri N. Ahmed and the said

entry is on the payment side of the cash book and late Borbora, Drawing and Disbursing Officer put his initial against the said payment. To a specific question put by the learned trial Court he stated that acquittance roll must be attested by the Disbursing Officer under his own signature, but admitted that Ext. 118 an acquittance roll does not contain a single such attestation. P.W. 4 who was the Office Superintendent in the office of the Director of Agriculture and Community Development has been examined to prove that the said Director was the Disciplinary Authority of the accused-appellant P. W. 5 Sri M. C. Joshi was the Director of Agriculture, Arunachal Pradesh who granted sanction for prosecution He has admitted the fact that his appointment was set aside by the judgment and order dated 19-5-75 passed by this Court in Civil Rule No. 491 of 1973, that stay order was granted by the Supreme Court on 14-7-75 and that he accorded the sanction, Ext. 120 on 5-7-75. He has categorically stated that he accorded the sanction after examining the allegations and the materials collected against the accused and after being satisfied that there was a prima facie case against the accused-appellant for his prosecution P.Ws. 6 and 7 were working as peon in the office of the Assistant Director at North Lakhimpur and they have been examined by the prosecution to prove the fact that no peon by name Sri N. Ahmed worked in the said office at North Lakhimpur. P.W. 9 is the Office Superintendent of the office of the Assistant Director of Supply and Transport at North Lakhimpur and he has stated that no peon named Sri N. Ahmed was appointed in his office and no amount as pay of Sri N. Ahmed was received by his office. The evidence of P.Ws. 6,7 and 8 is not relevant as it is not the case that the said peon Sri N. Ahmed was working at North Lakhimpur. P.W. 10 is the Hand Writing Expert and his evidence is not relevant for the present purpose. P.W. 11 was working as Deputy Director, Supply and Transport at North Lakhimpur during the relevant period and he has been examined to prove that no person named as N. Ahmed worked under him as peon at North Lakhimpur and that the pay and allowances of said Sri N. Ahmed was never received by his office. His evidence is also not relevant for the present purpose. P.W. 12 was L.D.C. in the office of the Director of Supply and Transport at Jorhat. He has been examined to prove that he did not see any person by name Sri N. Ahmed working in his branch. He has given names of some peons and has stated that there were other peons whose names he did not remember. He has

also stated that peons were transferred 'from Lilabari (North Lakhimpur) to Rowriah (Jorhat). He has also admitted in cross- examination since he did not know the peons even if a peon by the name Sri N. Ahmed worked in his establishment he could not say. P.W. 13 Sri R. K. Haranga was the Director of Supply and Transport at Jorhat at the relevant period. He has admitted that the note Ext. 7 was put up with the endorsement, Ext. 8 by the Assistant Director (late Borbora) and in the note it was mentioned that Sri Ahmed worked up to 30-11-71 and that he asked the Assistant Director to 'speak'. He has stated that to his knowledge he did not sign any order of appointment of Sri N. Ahmed. According to him, the Deputy Director of Supply and Transport, North Lakhimpur reported to him that though Sri N. Ahmed was appointed as office peon at North Lakhimpur against a vacancy caused due to leave of Sri B. P. Sarma, the said Sri N. Ahmed did not work in the office at North Lakhimpur and he requested Sri Borbora, Assistant Director to scrutinize the matter and let him know the position. According to him he reported the matter to the Superintendent of Police, C.B.I, for investigation in writing giving the entire history of the case. He has admitted in cross-examination that Ext. 10, which is the personal file of Sri B. P. Sarma, his approval for the appointment of Sri Sarma was not in the file. He has further admitted that in the office, an order book was maintained in which signed copies of appointment orders were kept. From his evidence, I find that the appointment of Sri N. Ahmed, Ext. 11 was processed in the file No. Estt-R-67/Per/25. He has also admitted that some persons had worked at his compound for maintenance of ornamental trees and flowers and he did not know whether the said persons were Hindus, Muslims or Christians. He has admitted the letter of his wife, Ext. F written to the accused-appellant on 5-10-71 by which his wife asked for extra one hand (Muslim) for cooking. He does not remember if at that time only one Muslim peon was working under him. He admitted the person appointed for Lilabari (North Lakhimpur) could be utilized at Rowriah (Jorhat) if it became necessary or expedient. He did not remember if late Borbora discussed with him regarding the appointment of Sri N. Ahmed as peon. He also could not remember if the accused-appellant sent the peon Sri N. Ahmed to his residence as directed by his wife. P.Ws. 14 and 15 are the Investigation Officers. P.W. 14 has stated that he made efforts to locate the person named Shri N. Ahmed, but could not find such person.

From the evidence of the Investigating Officer, I find that the office of the Superintendent of Police, Establishment, Shillong has been declared as a Police Station and this fact is necessary in considering the present case.

7. I have noted the relevant portion of the evidence of the present case.

8. The first contention of Mr. Bhattacharjee, learned Counsel for the accused-appellant is that the evidence on record does not prove the ingredients necessary for convicting the accused-appellant. In this connection, Mr. Bhattacharjee placed before me a catena of decisions. On the other hand Mr. Hazarika, learned Special Public Prosecutor, C.B.I, has submitted that there are sufficient evidence to bring home the charges against the accused person.

8-A. In *M. Narayanan Nambiar v. State of Kerala* : (1963)11LLJ660SC the Supreme Court considered Section 5(l)(d) of the Act and held that public servant causing wrongful loss to the Government by benefiting third party the above section applies. It was also held that the juxtaposition of the word 'otherwise' with the words 'corrupt or illegal means', and the dishonestly implicit in the word 'abuse' indicate the necessity for a dishonest intention on the part of the public servant to bring him within the meaning of the said Clause (d).

9. In *Rabindra Kumar Dev v. State of Orissa*, : 1977 CriLJ173 the Apex Court considered Section 5 of the Act and held that (1) the onus lies affirmatively on the prosecution to prove its case beyond reasonable doubt and it cannot derive any benefit from weakness or falsity of the defence version while proving its case; (2) in a criminal trial the accused must be presumed to be innocent unless he is proved to be guilty; and (3) the onus of the prosecution never shifts. The Court further observed that once the accused gives a reasonable and probable explanation, it is for the prosecution to prove affirmatively that the explanation is false and that in a criminal trial, it is not at all obligatory on the accused to produce evidence in support of his defence and for the purpose of proving his version he can rely on the admissions made by the prosecution witnesses or on the documents filed by the prosecution.

10. In *S. K.Kale v. State of Maharashtra*, : [1977]2SCR533 it was held that the Court below had proceeded on the wrong footing that it was for the accused and not for the prosecution to prove that the accused made enquiries from the local market or that he knew about the rate etc. The Supreme Court considered the Clause (d) of Sub-section (I) of Section 5 of the Act and held that it was for the prosecution to prove affirmatively that the appellant by corrupt or illegal means or by abusing his position obtained any pecuniary advantage for some other person. Considering the fact and circumstances of that case the Apex Court was of the view that the best person who would have thrown a flood of light on the subject and whose evidence would have clinched the issue whether or not the accused was authorised to depart from the normal procedure and who was examined by police during investigation was not produced before the Court and in absence of his evidence there was no legal justification to hold that the accused had departed from the normal procedure without authority. On the above ground the Court held the accused was not guilty.

11. Situated thus, I hold that in the instant proceeding the prosecution must prove beyond reasonable doubt the ingredients of Section 5 of the Act and Section 420, I.P.C. and this onus of proof of the prosecution never shifts. The accused shall be presumed to be innocent unless the prosecution has proved that he was guilty. The prosecution must also prove by satisfactory and convincing evidence that the accused abused his position as a public servant dishonestly and for that purpose the prosecution must produce the best evidence more particularly the evidence of the person who would have thrown a flood of light on the subject and whose evidence would clinch the issue.

12. From the evidence on record, gist of which has been stated above, the prosecution has relied upon the following evidences to prove their case namely (i) Ext.,7 the endorsement of the accused; (ii) Ext. 11, the appointment letter of Sri N. Ahmed wherein the accused put his initial, Ext. 11(2); (iii) oral evidence to prove that no person by name Sri N. Ahmed worked in the office either at Jorhat or at North Lakhimpur; (iv) oral and documentary evidence showing that the appointment of Sri N. Ahmed was not approved by the Director and as such the appointment letter, Ext. 11 was a fake one; (v) the Acquittance Roll of Sri A. K.Roy

and Sri N. Ahmed which was not attested by a competent officer; and (vi) Ext. 12 by which the accused asked the cashier to give him the pay of Sri A. K. Roy and Sri N. Ahmed as he had already paid them from his pocket.

13. As Mr. Hazarika, learned Special Public Prosecutor, C.B.I. has put great stretch on Ext. 7 as according to prosecution on the basis of Ext. 7 the said alleged fake appointment letter, Ext. 11 was issued and on the basis of which the amount of Rs. 775/- as pay and allowances was drawn. I would like to reproduce below the said Ext. 7 which runs as follows:

ADST NL has informed that Shri Sohan Tapno has been engaged as his personnel peon from 1-12-71.

We have one post of personnel peon as one Shri Bama Prasad left the job. In his place Shri N. Ahmed worked up to 30-11-71 who also left job.

Now against the clear vacancy of peon, Shri Sohan Tapno may be appointed as Personnel peon of ADST NL.

On the above note Lt. Borbora put up the file to the Director with the following endorsement :-

D.S.T. may like to approve appointment of Shri Sohan Tapno as personal peon to A.D.S.T. NL in the vacancy caused due to non-turning up of Shri N. Ahmed who left in November last. As recommended by A.D.S.T., N.L. Shri Sohan Tapno may be appointed w.e.f. 1-12-71.

On the above suggestion of late Borbora, Assistant Director, the Director passed the following order :-

'Please speak' -

Thus it is clear that no suggestion was made by the accused that Sri N. Ahmed should be appointed as a peon for the relevant period. He only made a statement of fact that Sri N. Ahmed worked up to 30-11-71 which was duly supported by late Borbora, Assistant Director in his endorsement, Ext. 8. From Ext. 7,1 cannot hold that by the above note the accused manipulated or dishonestly obtained the

alleged fake appointment letter, Ext. 11. Incidentally, it may be mentioned that accused was only an Office Superintendent and the final orders were passed by superior and responsible officers namely late Borbora, Assistant Director and Sri Haranga, Director.

14. There is no dispute that in Ext. 11 the accused put his signature. But Ext. 11 was duly signed by late Borbora, Assistant Director and it was shown as signed by the Director. Director, Sri Haranga, P.W. 13 has stated from his memory that he did not sign the appointment letter, Ext. 11. But P.W. 1 who was the Office Superintendent and as such custodian of all official records has clearly stated that the Ext. 11, the appointment letter of Sri N. Ahmed was signed by late Borbora, Assistant Director and approved by P.W. 13 Sri Haranga, Director. P.W. 13 has admitted in cross-examination that an order book was maintained in which the signed copies of appointment orders were kept. He has also stated that the appointment letter, Ext. 11 shows the number of order book as PT-II (VOL-I). The said order book has not been produced. Naturally the order book was kept in the office and P.W. 1 had knowledge of the said order book and accordingly he made the above statement that appointment in question was approved by the Director. In view of the non-production of the order book, I am not prepared to accept the oral statement of P.W. 13 that he did not sign the appointment order, Ext. 11. From Ext. 11 and also from evidence of P.W. 13, it is clear that appointment of Shri N. Ahmed was processed in file No. Estt-R/67/Per/25; the said file has not been produced by the prosecution.

15. In Ram Das v. State of Maharashtra, : 1977 CriLJ955 their Lordships found that the alleged letter of threat of murder was not produced and held that only reasonable inference that can be drawn would be that the letter if produced would have falsified the evidence of the witnesses. As the prosecution has failed to produce the order book in which the original of Ext. 11 was kept and also the relevant file relating to issuance of Ext. 11, the only inference that I can draw is that these documents, if produced would have gone against the prosecution. In my opinion, non-production of the said documents is fatal and in absence of these documents I am unable to hold that the accused dishonestly manipulated the said appointment letter by abusing his position as public servant. Incidentally, it may be

mentioned that P.W. 13 has stated that he sent a written report to the Superintendent of Police, C.B.I, for investigation giving the entire history of the case. From the evidence of the Investigating Officer, I find that Office of the said Superintendent of Police is a Police Station. Prosecution has not produced this important piece of document. That apart, it was legal duty of the Superintendent of Police to treat the said letter as F.I.R. or at least an entry in the General Diary of the said P.S. ought to have been made. No explanation is forthcoming from the prosecution.

16. From the evidence of P.W. 13, I find that in the persons' file of Sri Bama Prasad Sarma, Ext. 10, the Director, P.W. 13 could not find his approval for appointment of Sri Bama Prasad Sarma in the said file. That Sri Bama Prasad Sarma was duly appointed as peon is not disputed by the prosecution. In view of the above factual position I am of the opinion that appointments were being issued in respect of the peons even without obtaining formal orders of the Director. Even if in the instant case, no formal approval was obtained by late Borbora regarding appointment of Sri N. Ahmed as peon, it cannot be held that the said order was a fake one as the procedure followed by the office of the Director of Supply and Transport at the relevant time was that no formal approval of the Director was necessary to be obtained. Even if the appointment order, Ext. 11 is a fake one, I cannot hold the accused-appellant responsible for the said order merely because he put his initial as the copy of the appointment order, Ext. 11 was duly signed by late Borbora, the then Assistant Director. In view of what has been stated, above, I hold that prosecution has failed to prove that the appointment letter, Ext. 11 for appointing Shri N. Ahmed was issued without obtaining the approval of Director and the said appointment was a fake one.

17. As stated earlier prosecution tried to prove that no person by name N. Ahmed worked as peon by adducing oral evidence and by proving Attendance Register. The oral evidence is not at all reliable. I have already stated that evidence of P.Ws. 6, 7 and 8 is not relevant as they have stated that no peon by name Shri N. Ahmed worked in the office of the Assistant Director at North Lakhimpur. It is the case of the accused that the said person worked at Jorhat. P.W. 12 was a L.D.C. in the Office of the Director, Jorhat who has been examined to prove this point. But

he has stated that there were other peons also whose names he did not remember and he did not know all the peons of his Branch by name. He has also admitted in cross-examination that he cannot say if any peon by name Sri N. Ahmed worked in his establishment. So he does not support the prosecution story. I am unable to hold from the oral evidence adduced by prosecution that no peon by name Sri N. Ahmed worked in the office of the Director at Jorhat for the above period.

18. Regarding Attendance Register, Mr. Bhattacharjee, learned Counsel for the accused-appellant has drawn my attention to a decision of the Apex Court in *Brijbasi Lai Shrivastava v. State of Madhya Pradesh*, : 1979 CriLJ913 wherein their Lordships held that mere absence of name in the Attendance Registers would not conclusively prove that the person was not an employee. In view of the law laid down by the Supreme Court, I am, unable to hold that Sri N. Ahmed did not work as peon during the relevant period only because his name was not mentioned in the Attendance Register. That apart, the accused in his statement under Section 313, Cr.P.C has explained that there were other Attendance Register of some other Branches like record branch etc. (vide answer to question No. 18) and that his name may be there in other Attendance Registers which have not been seized and exhibited in this case (vide answer to question No. 19). P.W. 1 has stated in cross-examination that certain personal peons attached to the Director used to stay in the house of the Director. Though this witness stated he cannot say if the said personal peons put their signature in the Attendance Register, I am of the opinion that the question of signing the Attendance Register by the personal peon cannot arise as most of the time the said peon stay with the officer concerned. I am, therefore, unable to hold from the oral evidence and also from the Attendance Register that no peon by name Shri N. Ahmed worked in the 'Office of the Director, Jorhat as alleged by the prosecution. Another allegation is that Sri N. Ahmed was appointed in the vacancy caused at North Lakhimpur. But the specific plea of the accused is that though Sri N. Ahmed was appointed against the said vacancy, he was actually working at Jorhat. The Director, P,W. 13 has stated that a person appointed at Lilabari (North Lakhimpur) could be utilized at Rowriah at Jorhal if it became necessary. In view of the above statement, there is no irregularity or illegality if said Sri N. Ahmed was appointed and utilized by Jorhat Office though he was appointed in a vacancy caused at Lilabari, North

Lakhimpur. The accused has given satisfactory explanation.

19. Another factor on which the prosecution has placed reliance is the acquittance roll by which the pay of Sri N. Ahmed was disbursed. According to the prosecution, this acquittance roll was not attested by an officer as required under rules and P.W. 3 has made a statement to that effect. But to a specific question put by the trial Court, this witness has categorically stated that Exhibit-118 an acquittance roll book did not bear a single attestation by the Drawing Officer. This fact shows that the said office procedure of attestation was not strictly followed and as such this piece of evidence has no value. In cross-examination the said witness P.W. 3 has stated that Exhibit-19 (1) was an entry in the Cash Book on the payment side showing payment to Sri N. Ahmed and this was duly attested by late Borbora, the Drawing and Disbursing Officer. This piece of evidence falsifies the prosecution Story that no payment was made to Sri N. Ahmed as pay and allowances during his period of service. '

20. Exhibit-12 is a note alleged to have been sent by the accused-appellant to the cashier asking him to pay the amount of pay and allowances of one Sri A. K. Roy and Sri N. Ahmed on the ground that the accused-appellant paid from his pocket the amount to Sri Roy and Sri N. Ahmed. But there is no evidence to show that any action was taken by the cashier on the said note, Exhibit-12. In other words prosecution has not produced any evidence whatsoever to show that this amount was actually paid to the accused-appellant. The trial Court has also rightly held that the prosecution failed to prove that amount of Rs. 775/- being pay and allowances of Sri N. Ahmed was paid to the accused-appellant. I am, therefore, of the opinion that the said slip, Exhibit-12 does not help the prosecution in establishing the guilt of the accused.

21. As late Borbora died during trial, Mr. Bhattacharjee, learned Counsel for the accused-appellant has submitted that this Court for ends of justice can look into the statement made by late Borbora to police during investigation under Section 161, Cr. P.C. and in support, he has placed reliance in Priyalal Barman v. The State, AIR 1970 Assam 137 : (1970 Cri LJ 1599) in which a Division Bench of this Court held that the case diary is a very important document and though the

contents of the diary cannot be treated as evidence in a trial but the Court is entitled to peruse the same under Section 172(2), Cr. P.C. to aid it in the trial. this Court further held that this duty is incumbent upon a Public Prosecutor and almost always so upon a Court trying a serious offence. Court also held that where the prosecution and defence are both inadequate, it will enable the Court to rise up to the occasion and discover for itself the material facts and circumstances from the case diary, which can be brought to light through the witnesses examined in the case to arrive at the truth in the interest of justice.

22. In fact in view of what has been stated above, it is not necessary for me to look into the statement of late Borbora as I have already found that prosecution has not been able to produce reliable and cogent evidence against the accused-appellant. However, for the ends of justice, I have looked into the case diary and I found that according to late Borbora, the appointment of Sri N; Ahmed was duly approved by the Director and the date from which he was actually working is available in the file from which the appointment order was issued. I have already held that prosecution has not produced the said file. In fact the statement of Sri Borbora goes entirely against the prosecution and supports the case of the accused-appellant.

23. In *S. P. Bhatnagar v. State of Maharashtra*, : 1979 CriLJ566 while dealing with the provisions of the Act, the Court held that Section 5(1)(d) requires that the abuse of position in order to come within the mischief of the section must necessarily be dishonest so that it may be proved that the accused caused deliberate loss to the Department. The Court further held that in cases where the evidence is of a circumstantial nature, the circumstances from which the conclusion of guilt is to be drawn should in the first instance be fully established and all the facts so established should be consistent only with the hypothesis of the guilt of the accused, and that the circumstances should be of a conclusive nature and tendency and they should be such as to exclude every hypothesis but the one proposed to be proved. In the case in hand, the evidence produced by the prosecution is of circumstantial nature. But from the circumstances shown by the prosecution I cannot come to definite conclusion that the accused-appellant was guilty .of the charges. In fact the facts produced by the prosecution do not show that the accused was guilty of the said charges.

24. The accused has also been charged under Section 420, I.P.C. for cheating the Arunachal Pradesh Administration by dishonestly inducing it to deliver to the accused Rs. 775/-. The learned trial Court found that the prosecution failed to prove that this amount was paid to the accused and I also agree with the above finding of the learned trial Court. So, the main ingredients of the offence has not been proved and as such accused-appellant cannot be convicted under the aforesaid section.

25. The accused has stated specifically while he was examined under Section 313, Cr. P.C. that the appointment of Sri N. Ahmed was processed in the relevant file and his appointment was approved by the Director and he was working as peon for the relevant period in the office of the Director at Jorhat. He has also stated that said Sri N. Ahmed was sent to the house of the Director, P.W. 13 at the request of his wife to work as a cook and that Mrs, Haranga, the wife of the Director would be able to throw light that Sri N. Ahmed worked at her house. Exhibit-F is a note dated 5-10-71 written by Mrs. Haranga and has been proved by her husband, P.W. 13. Prosecution has not examined Mrs. Haranga. By Exhibit-F Mrs. Haranga requested the accused-appellant to send 'that Muslim chap who can cook' to her house. I see no reason to discard this piece of evidence. In view of the evidence on record and more particularly Exhibit-F, the case of the accused-appellant has considerable force and as such it cannot be thrown out.

26. Mr. Bhattacharjee has attacked the charge framed by the learned trial Court and has also submitted that the prosecution by giving 3 different stories, namely, in the F.I.R., in the charge-sheet and at the trial has constructed a new theory at the time of trial.

27. In *Devilal v. State of Rajasthan*, : 1971 CriLJ1132 it was held in criminal trials it is of prime importance for the accused to know as to what the exact prosecution case is and if the pivot of the prosecution is not accepted a new prosecution case cannot be made to imperil defence.

28. In *State of U.P. v. Hari Prasad* : 1974 CriLJ1274 it was held that it is not open to the prosecution to ask the Court to discard the very substratum pf their case and to construct a new theory founded on a hypothesis presented for the first time

before the Apex Court. It is true that three different versions were given by the prosecution. But the main allegation that the accused manipulated the alleged fake appointment order in the name of Sri N. Ahmed as peon and that on the basis of the said appointment letter the amount of Rs. 775/- was drawn as pay and allowances of Sri N. Ahmed has not been changed. So, the ratio laid down by the Apex Court in the above decisions is not applicable to the instant case.

29. It is, settled law that the defect in the framing of the charge, though a material one can be condoned if the accused is not prejudiced, see *State of Assam v. Barga Dewani*, : (1970)3SCC236 W. *Slaney v. State of Madhya Pradesh*, : 1956 CriLJ291 *Romesh Chandra Arora v. State* : 1960 CriLJ177 .

30. In *Nanigopal Mitra v. State of Bihar* : 1970 CriLJ1396 it was held that the charge under Section 5(2) of the Act did not disclose the amount taken as bribes and the persons from whom the accused has taken such bribe and the Court held that this does not invalidate the charge though it may be ground for asking better particulars.

31. In the instant proceeding, I have perused the charge, the evidence on record and the questions put to the accused-appellant during his examination under Section 313, Cr.P.C. and I do not find that any prejudice was caused to the accused-appellant. If there was any vagueness in the charge, the accused could have asked for more particulars. I am, therefore, of the opinion that the contention of Mr. Bhattacharjee has no force.

32. The last contention of Mr. Bhattacharjee, learned Counsel for the accused-appellant is that prosecution must fail as there was no valid and legal sanction as required under Section 6 of the Act. Exhibit-li2 is the said sanction issued by the Director of Agriculture Mr. M. C. Joshi, P.W. 5.

33. Section 6 of the Act, inter alia, provides that no Court shall take cognisance of any offence punishable under Section 161 or Section 164 or Section 165 of the Indian Penal Code, or under Sub-section (2) or Sub-section (3-A) of Section 5 of the Act, alleged to have been committed by a public servant, except with the previous sanction from the authorities mentioned in Clause (a), (b) and (c) of S. (1)

of the said Section 6. Admittedly the accused-appellant was a public servant and there is no dispute that the Director of Agriculture, Arunachal Pradesh Administration was the authority competent to remove him from office and as such the sanction for prosecution was to be issued, by the said Director. The language of Section 6 is clear and unambiguous and a valid sanction is a condition precedent to prosecute an accused, who is a public servant in a court of law. Such sanction must be issued by a competent authority as provided in Clause (a), (b) and (c) of the said Section. If there is no valid sanction, the condition precedent for taking cognizance of offence by the Court is absent, the entire proceeding will be illegal and invalid.

34. In Mohd. Iqbal Ahmed v. State of Andhra Pradesh : 1979 CriLJ633 it was held that it is incumbent on the prosecution to prove that a valid sanction has been granted by the Sanctioning Authority after it was satisfied that a case for sanction has been made out constituting the offence. By an order No. PC 39/65 dated 6-7-1973 Sri M. C. Joshi, P.W. 5 was appointed as officiating Director of Agriculture, Arunachal Pradesh Administration and this order was challenged before this Court by a writ petition which was registered as Civil Rule No. 491 of 1973. By the judgment and order dated 19-5-1975 the said notification was quashed. The said judgment of this Court was stayed by the Apex Court by an order dated 14-7-1975 passed in Civil Miscellaneous Petition No. 3682 of 1975 and the stay order runs as follows :

Pending the hearing and final disposal by this Court of the said notice of motion for stay, the status quo as obtaining between the parties herein as on this 14th day of July, 1975 with regard to the post of Director of Agriculture, Arunachal Pradesh shall continue.

Thus it appears that the stay order was operative only from 14th July, 1975 and as such from 19th May, 1975 to 13th July, 1975 Sri Joshi was holding the said post illegally and without due authority. The sanction for prosecution, Exhibit-120 was issued by Shri Joshi on 5-7-1975 i.e. before the stay order was obtained. As Sri Joshi was holding the post on the date of issuing sanction for prosecution without any authority of law he was an usurper to the said post and as such the sanction

for prosecution Exhibit-120 accorded by the P.W. 5 on 5-7-1975 is a nullity. In view of the above legal position 'the doctrine of De facto' will not be applicable in respect of the said sanction order, Exhibit-120.1, therefore, hold that there was no valid and legal sanction for prosecution in the instant case and as such the condition precedent for taking cognizance of this case by the trial Court was absent. On this ground alone the trial and the impugned judgment and order are liable to be quashed.

35. From what has been stated above, I hold that prosecution has failed to prove that accused-appellant was guilty under Section 5(1)(d) read with Sub-section (2) of the said Section 5 of the Act and under Section 420,1.P.C. and as such the impugned judgment and order dated 2-U-1979 passed by the learned Special Judge, Gauhati in Special Case No. 10 of 1975 is liable to be quashed, which I hereby do.

In the result, the appeal is allowed and the accused is discharged from bail bond.

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